No.....

IN THE

Supreme Court of the United States

(OCTOBER TERM, 1936)

S. P. KELLY, Trustee in Bankruptcy for the Carlisle Packing Company, a Corporation, Bankrupt,

Petitioner,

VS.

UNITED STATES OF AMERICA, and the COLLECTOR OF INTERNAL REVENUE for the United States of America, and the COLLECTOR OF INTERNAL REVENUE for the Collection District of Washington,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT

This is an application for a Writ of Certiorari for a review of the decree of the United States Circuit Court of Appeals for the Ninth Circuit, affirming a decree of the United States District Court for the Western District of Washington.

Material facts and the questions involved are set

forth in the foregoing petition. The question for decision is whether the United States Government's claim filed in the bankruptcy court for income taxes based on the decision of the Board of Tax Appeals is within the jurisdiction of the bankruptcy court to determine the amount and legality thereof; or is the decison of the Board of Tax Appeals *res judicata* on the amount and legality of the tax and binding on the bankruptcy court?

The contention of the petitioner is that the bankruptcy court is clothed with plenary authority to hear and determine claims in bankruptcy proceedings for taxes due; that when objection is made to the payment of a claim for income taxes, even though the claim is based upon a decision of the Board of Tax Appeals, the bankruptcy court is clothed with jurisdiction to determine the amount and legality of such income tax.

First Point

The Circuit Court of Appeals for the Ninth Circuit, erroneously decided that the bankruptcy court was without jurisdiction to hear and determine the amount and legality of a claim for income taxes, not justified by the facts and contrary to the decisions of this court and contrary to the rulings of other Circuits and contrary to the weight of the authorities.

Second Point

The Circuit Court of Appeals erroneously affirmed the decision of the District Court as a penalty for failure to comply with Equity Rule 75(b).

ARGUMENT—FIRST POINT

The jurisdiction of the U. S. District Court to pass upon a claim for taxes rests upon Sec. 64a of the Bankruptcy Act, as follows:

> "Sec. 64a. The Court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality, in the order or priority as set forth in paragraph (b) hereof; PROVIDED, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustees shall be credited with the amounts thereof, *and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.*" (Italics ours)
>
> U. S. Code, Title 11, Sec. 104a.

On appeal filed with the U. S. Board of Tax Appeals by the Carlisle Packing Company, opinion was rendered (R. 10) and orders of deficiency entered January 4, 1934 (R. 16), upon which the Commissioner of Internal Revenue made his summary assessment in the total amount of $20,515.52 (R. 23).

Thereafter, and while the right of appeal from the decision of the Board of Tax Appeals still existed, the Carlisle Packing Company was on the 9th day of February, 1934, on involuntary petition adjudicated a bankrupt (R. 2). Thereafter, and on the 1st day of June, 1934, a statement of claim for income taxes

due the United States was filed in the bankruptcy proceedings (R. 3); and the trustee in bankruptcy objected to such claim for income taxes (R. 6); and the referee, over the Government's objections, proceeded to determine the amount and legality of the tax (R. 7), and rendered its decision disallowing such claim for income taxes (R. 90). The Government filed its petition for revision of such decision by the United States District Judge (R. 107).

The District Judge rendered his written opinion holding that the decision of the Board of Tax Appeals became *res judicata* and binding upon the bankruptcy Court, and that for such reason the bankruptcy court was without jurisdicton to determine the amount and legality of the tax.

The decision of the bankruptcy court that it was without jurisdiction to determine the amount and legality of income taxes in the sum of $20,515.52, because the questions pertaining thereto had been decided by the Board of Tax Appeals, was affirmed by the Circuit Court of Appeals for the Ninth Circuit.

We respectfully submit that the decision of the Circuit Court of Appeals for the Ninth Circuit, affirming the decision of the District Court for the Western District of Washington, is in conflict with the decisions of this Court and with the decisions of other Circuit Courts of Appeals.

In construing Sec. 64(a) of the Bankruptcy Act, this Court declared:

"The Section (64a) itself declares that in case

of disputes as to the amount or legality of any such tax, they shall be heard and determined by the Court. The State Court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a federal statute, giving preference to tax, is a federal question, of ultimate decision in this Court. * * *"

And again:

"But be that as it may, Section 64(a) specifically provides that in any case any question arises as to the amount or legality of taxes, the same shall be heard and determined by the Court, with a view to ascertaining the amount really due. We do not think it was the intention of Congress to conclude the Bankruptcy Courts by the findings of Boards of this character, and that the claim should have been upon the basis of the capital stock actually outstanding."

New Jersey v. Anderson, 203 U. S. 483.

Decisions of the Circuit Courts of Appeals and District Courts in conflict with the instant case, are as follows:

In re Williams Oil Corp. (D. C.) 265 Fed. 401;

In re General Film Corp. (C. C. A. 2) 274 Fed. 903;

In re Heffron Co. (D. C.) 216 Fed. 642;

In re Anderson (D. C.) 275 Fed. 397 aff'd (C. C. A. 2), 279 Fed. 525;

In re United Five and Ten Cent Store (D. C.) 242 Fed. 1005;

In re Heller, Hirsh & Co. (C. C. A. 2) 258 Fed. 208;

In re Sheinman (D. C.) 14 Fed. (2d) 323;

In re George F. Redmond & Co. (D. C.) 17 Fed. (2d) 128;

Commonwealth of Massachusetts v. Meehan (C. C. A. 1) 67 Fed. (2d) 638.

Departmental regulations issued by the United States Treasury are in conflict with the decision in the instant case, but in conformity with the decisions of this Court and the several courts above cited; and further confusion and multiplicty of suits will arise if the decision in the instant case is not reviewed by this Court.

> "Bankruptcy Courts have complete jurisdiction under Section 64(a) of the National Bankruptcy Act to determine all disputes regarding the amount and validity of the taxes of a bankrupt."
>
> Regulations 77 "Income Tax," Revenue Act of 1932, Article 1191, p. 313.

ARGUMENT

Second Point

The Circuit Court of Appeals erroneously affirmed the decision of the District Court as a penalty for failure to comply with Equity Rule 75(b).

Equity Rule 75(b), by general order in bankruptcy No. 36, regulates the manner of preparing and certifying the statement of the evidence on appeal from the bankruptcy court. Relator inadvertently failed to comply with this rule, and the statement of evidence was not authenticated by a certificate of the District Judge.

The record on appeal contained a purported statement of evidence treated by both the appellant and respondent as true and correct, and its form was considered to be sufficient and its veracity was unquestioned by either party and both relator and respondent filed briefs and made oral arguments based on such statement. However, the statement was not authenticated by a certificate of the Court or District Judge as required by Equity Rule 75(b).

The cause having been submitted on written briefs and oral arguments without objection from either party, a divided court of its own motion decided that no statement of evidence was before it, and without a decision on the merits, affirmed the court below. One of the Judges, Hon. Bert Emory Haney, wrote a dissenting opinion holding that a decision upon the merits was desirable where possible, and that the court should remit the record with direction to sup-

ply the certificate of authentication by a supplemental transcript.

Thereupon relator petitioned for re-hearing, and asked that the Circuit Court of Appeals for the Ninth Circuit vacate the setting and remit the record to the District Court for proper authentication, and on denying the petition there was again a divided Court. Two of the Judges on written opinion denied the petition for he-hearing. One of the Judges, Hon. Bert Emory Haney, again wrote a dissenting opinion following a former decision of that court.

No question was raised on the sufficiency of the record by either party; and both parties submitted voluminous briefs and made oral argument on the record before the Court assuming the same to be properly authenticated.

As pointed out in the dissenting opinion,

> "The point took its origin from the bench without suggestion from or reference to either party and in the face of extended argument and voluminous briefs based upon the statement of evidence contained in the abstract."

The decision of the Circuit Court of Appeals, Ninth Circuit, in the instant case is in conflict, on a question of practice, with decisions of this Court and of the Circuit Courts of Appeals. In the instant case the Court did not require a compliance with Equity Rule 75(b); it exacted a very severe penalty for failure to comply, by affirming the decision of the Bankruptcy Court. In the case of *Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co.*, 275

U. S. 372, the Supreme Court of the United States held that the Court of Appeals passed the bounds of a sound discretion in affirming the decree, and that the transcript should have been remitted to the District Court for opportunity to comply with the Equity Rule. In *Sommer v. Rotary Lift Co.* (C. C. A. 9) 66 Fed. (2d) 809, in an equity appeal there was no statement of evidence whatever, yet the court ordered the submission to be vacated and a supplemental transcript containing a statement of the evidence. This decision was pointed out in the dissenting opinion in the instant case as being in conflict with the decision rendered by the majority of the court.

In the instant case the court went farther than deciding that the rule must be complied with, and exacted a severe penalty by affirming the decision in the bankruptcy court.

Respectfully submitted,

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